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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STONE & WEBSTER ENGINEERING CORPORATION,
Petitioner,

VS.

DONALD LINDLEY AND RITA LINDLEY,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 22, 1986

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12-1-P

QUESTION PRESENTED

Plaintiffs timely filed an action in state court naming fictitious parties under state law. The complaint was removed to federal court by the named defendant. Under state law, plaintiffs would be permitted to name defendants within three years of this initial filing, and those defendants are considered parties to the action from the time of commencement for the purposes of the statute of limitations. Rule 15(c), the federal rule concerning relation-back, permits an amendment changing the party against whom a claim is asserted if the added defendant had notice "within the period provided by law for commencing the action against him." Fed.R.Civ.P. 15(c). California courts have consistently held that plaintiffs have up to three years within which to "name" the fictitious party for the purposes of the statute of limitations if the state complaint names "DOE" parties and is filed within one year.

The Ninth Circuit found that Rule 15(c) would otherwise apply, but that the action was not time-barred under California's substantive statute of limitations. Since Rule 15(c) was designed to control amendments sought *after* the limitations period had expired, it did not apply here because under state law plaintiffs would have a substantive right to serve the fictitiously-named defendant within three years.

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Respondents Donald Lindley and Rita Lindley, in response to petitioner's prayer for a writ of certiorari, oppose said petition and pray that said petition be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 780 F.2d 797 (9th Cir. 1986). All references to that opinion will refer to its reproduction in Appendix A to the petition of Stone & Webster Engineering Corporation (hereinafter "Stone & Webster").

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT CONCLUDED THAT THE SCOPE OF RULE 15(c) WAS NOT AS BROAD AS URGED BY PETITIONER

A. Hanna v. Plumer supports the position taken by the Ninth Circuit

As this Court stated in *Hanna v. Plumer*, 380 U.S. 460 (1965),

> "It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by the Federal Rules. But the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforecement of state law." 380 U.S. at 470.

The Ninth Circuit, adopting the reasoning of Judge Pregerson in *Rumberg v. Weber Aircraft Corp.*, 424 F.Supp. 294 (C.D.Cal. 1976), found that Rule 15(c) "did not come into play" because the plaintiff filed and served the amended complaint within the state limitations period.

> "As we have explained, in the case before us Rule 15(c) does not determine the timeliness of plaintiffs' action against Stone & Webster." (App. A at A8).

Since ther was no "clash" as existed in *Hanna v. Plumer*, it found that plaintiffs' complaint was not time-barred.

In sum, the Ninth Circuit concluded that the *scope* of Rule 15(c) was not as broad as urged by Petitioner herein, since it has nothing to do with the period of limitations for commencing an action against fictitious parties.

B. Walker v. Armco Steel Corp. Supports the Ninth Circuit's Decision

In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), the issue was whether state law or a federal rule should be followed in determining when an action is commenced for the purpose of tolling the statute of limitations. Under state law, the two-year statute of limitations did not begin to run until service of the summons on the defendant. However, if plaintiff filed the complaint within two years and then served the defendant within 60 days, the action was deemed commenced from the date of the filing, even though service occured outside of the limitations period.

If FRCP Rule 3 was followed with respect to the "commencement" of actions, plaintiff's action would be tolled. If the state rules regarding commencement of actions were followed, plaintiff's lawsuit would be foreclosed.

In applying *Hanna v. Plumer, Supra*, the Court stated that the "first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies." 446 U.S. at 749-750.

In *Walker* the above analysis was applied. The court noted that Federal Rule of Civil Procedure Rule 3 was not intended to toll a state statute of limitations, much less to "displace state tolling rules for purposes of state statutes of limitations." 446 U.S. at 750-751. Since the state service rule was "part and parcel" of the state limitations period, and Rule 3 was not intended to replace those state policy determinations, each rule controlled " its own intended sphere of coverage without conflict." 446 U.S. at 752.

In the case now before this court, clearly Rule 15(c) was not intended to create a state limitations period by its clear meaning. Thus, there is no conflict between it and state procedures regarding fictitious parties. Further, it should be noted that plaintiffs filed their complaint in *state* court and exercized their state right to name fictitious parties. In this situation, it is defendant's right to remove the entire action to Federal Court. If the substantive "DOE" procedures found in state law are not followed by Federal

courts in diversity cases, defendants would be encouraged to go forum shopping. Further, there would be inequitable administration of the laws since planitiffs would clearly have had the right to proceed against Stone & Webster in their selected forum. This would conflict with the "twin aims" of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), which is discouragement of forum-shopping and avoidance of inequitable administration of the laws. *Hanna v. Plumer, Supra,* 380 U.S. at 468.

II

UNDER STATE LAW THE DOE PROCEDURE IS A STATUTORY RIGHT AND IS AN INTEGRAL PART OF THE STATUTE OF LIMITATIONS.

Plaintiffs properly followed state law regarding naming of ficitious parties. Those procedures have been referred to as "identical" to the base period of limitations under state law:

> "The nature and purpose of Section 581a and the statute of limitations after all, are virtually identical". *Barrington v. A.H. Robins Co.*, 39 Cal.3d 146 at 152 (1985).

In *Olden v. Hatchell*, 154 Cal.App.3d 1032 (1984), the Court stated that a substituted party "is considered a party to the action from its commencement so that the statute of limitations stops running as of the date the original complaint was filed." (Citations omitted).

In *Barrows v. American Motors Corporation*, 144 Cal.App.3d 1 at 7, (1983), the Court stated as follows:

> " . . . a defendant sued by fictitious name and later brought in by amendment substituting his true name *is considered a party to the action from its commencement for the purposes of the statute of limitations.*" (Emphasis Added)

Indeed, the provisions in question have been referred to as a statutory "right". *Austin v. Massachusetts Bonding & Insurance Co.*, 56 Cal.2d 596 at 602 (1961):

> "The right of a plaintiff to use a fictitious name where he is ignorant of the defendant's true name is one conferred by

> statute (Cod.Civ.Proc., Sec. 474), and it has long been recognized that the purpose of the provision is to enable such a plaintiff to bring suit before it is barred by the statute of limitations and that this procedure does not subject the defendant to undue hardship. (Citation omitted). . . . [the defendant] is considered a party to the action from its commencement for the purpose of the statute of limitations."

The *Austin* court went on to state that a plaintiff should not be penalized "merely because he was compelled to resort to his statutory right of using a fictitious name". 56 Cal.2d at 603.

As stated in *Munoz v. Purdy*, 91 Cal.App.3d 942, 946 (1979),

> "A plaintiff ignorant of the identity of a party responsible for damages may name that person in a fictitious capacity, a Doe defendant, *and that time limit prescribed by the applicable statute of limitations is extended as to the unknown defendant.*" [Emphasis Added].

With respect to Stone & Webster's argument that the state scheme is procedural, and not substantive, the Ninth Circuit pointed to *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945), where the court stated:

> "It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State Court opinions in any use of those terms unrelated to the specific issue before us."

The only case that considered the state procedures in question with respect to the specific issues before this Court was *Rumberg v. Weber Aircraft Corp.*, 424 F.Supp. 294 (C.D. Cal. 1976). In this case it was held that the state procedures are the functional equivalent of a limitations period of up to four years. This case has since been cited favorably by the California Court of Appeal in *Munoz v. Purdy, Supra*, 91 Cal.App.3d 942 at 946.

The Ninth Circuit correctly held that the state procedures are substantive. This time period determines the basis for applying Rule 15(c). In defense of its position, petitioner asserts that *Craig v. United States*, 413 F.2d 854 (9th Cir. 1965) is contrary to the instant Ninth Circuit decision. This assertion is erroneous. *Craig*

involved an *admiralty* suit, filed in federal court, and based upon federal law. The statute of limitations involved was a federal statute, and plaintiff sought to overcome this by utilizing state law rules. The case presented before this court is a diversity action where plaintiffs filed their complaint in state court based solely upon state law. To deny plaintiffs their substantive rights in this situation would be contrary to 28 U.S.C. Section 2072.

III

THE NINTH CIRCUIT'S APPLICATION OF RULE 15(c) DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

The diversity cases cited by petitioner in fact support the Ninth Circuit decision.

Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980) involved a wrongful death diversity case which was filed in federal court. Plaintiff did not have capacity to sue under North Carolina law and thus did not fall within the state limitations period. The federal court permitted the amendment under Rule 15(c), noting that the state procedure was "confined solely to technical procedural concerns in the prosecution of litigation." 615 F.2d at 612. Further, the court noted that there is a general policy embodied in the Federal Rules favoring resolution of cases on their merits, citing *Foman v. Davis*, 371 U.S. 178, 182 (1962). 615 F.2d at 613. A similar rationale was followed in *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967).

Welch v. Louisiana Power & Light Company, 466 F.2d 1344 (5th Cir. 1972) involved an interpretation of Louisiana law which did not have a statutory scheme for fictitious parties similar to California's scheme. A similar situation existed in *Loudenslager v. Teeple*, 466 F.2d 249 (3d Cir. 1972) involving Pennsylvania law.

Britt v. Arvanitis, 590 F.2d at 57 (3d Cir. 1978) and *Williams v. Avis Transport of Canada, Ltd.*, 57 F.R.D. 53 (1972) both involved state law procedural schemes that were procedural, and not substantive. In fact, in *Williams* the court refused to rely on the California scheme which was cited by analogy, and instead

relied on the applicable Nevada law, holding that its two-year statute of limitations was not extended. *Accord*, *Simmons v. Fenton*, 480 F.2d 133 (7th Cir. 1973). *Royal Indemnity Co. v. Petrozzino*, 598 F.2d 816 (3d Cir. 1979) involved a situation where New Jersey's fictitious party procedure was not available to the plaintiff at the time the complaint was filed. The court cited *Britt v. Arvanitis*, *Supra*, which interpreted the New Jersey law pertaining to fictitious parties and concluded that it was precedural and did *not* extend the state limitations period.

In sum, each district interpreting those conflicts correctly applied the substantive law of the state to determine how to apply Rule 15(c). California's scheme is substantive, and to prevent plaintiffs from proceeding against Stone & Webster on the merits would be tantamount to defeating plaintiffs' state law rights. Indeed, plaintiffs timely filed their action is state court and followed state law regarding designation of fictitious parties. To apply *Hanna v. Plumer* to defeat those rights would be contrary to the federal policy of litigating cases on their merits.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the opinion of the Ninth Circuit Court of Appeals was in accordance with both state and federal authority and thus not appropriate for review by this Court.

Respectfully submitted,

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